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No. 84-1534

In The
Supreme Court of the United States
October Term, 1984

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JOE E. LUTJEHARMS, Commissioner of Education, et al.,

Petitioners,

vs.

George Rose, as next friend of MARLA ROSE, et al.,

Respondents.

—o—

BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

JOHN PAUL HEIL
of BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68102
(402) 344-0500

Attorneys for the School District Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

The School District respondents, in compliance with Rules 22.1 and 34.1(a), suggest that the following questions are presented for review with respect to their involvement in this action:

1. Whether the Court of Appeals properly held that a fee award against the School District respondents would be unjust where such parties' action did not provide the basis for plaintiff's successful claim?

2. Whether attorney fee awards under 42 U.S.C. § 1988 should lie against the School District respondents against whom the only claim made is an inappropriate educational placement under the Education for All Handicapped Children Act (EAHCA)? This question is, in turn, dependent on whether a claim based solely on the EAHCA also states an independent claim under U.S.C. § 1983, given the rule of *Smith v. Robinson.*

LIST OF PARTIES

JOE E. LUTJEHARMS, Commissioner of Education for the State of Nebraska, STATE BOARD OF EDUCATION, WALTER M. THOMPSON, Individually, and as a Member of the State Board of Education, MARGARET LOCKWOOD, Individually, and as a Member of the State Board of Education, FRANK E. LANDIS, Individually, and as a Member of the State Board of Education, DON M. LIENEMANN, Individually, and as a Member of the State Board of Education, DOROTHY CREIGH, Individually, and as a Member of the State Board of Education, ARLENE E. HART, Individually, and as a Member of the State Board of Education, WILLIAM C. RAMSEY, Individually, and as a Member of the State Board of Education,

Petitioners,

vs.

GEORGE ROSE as next friend of MARLA ROSE, SCHOOL DISTRICT #1, DOUGLAS COUNTY, NEBRASKA,[1] OWEN KNUTZEN, Individually, and as Superintendent of the School District #1, Douglas County, Nebraska, DALE SAMUELSON, Individually and as Assistant Superintendent in Charge of Special Education of School District #1, Douglas County, Nebraska, DOROTHY BEAVER, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, JUNE BOSTWICK, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, WALTER CALINGER, Individually, and as a Member of the Board of Education, School District #1,

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[1] This political subdivision, technically the School District of Omaha, in the County of Douglas, in the State of Nebraska, together with its officers and the members of its Board of Education, are collectively referred to herein as the School District respondents.

Douglas County, Nebraska, PAT GERINGER, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, LEO HOFFMAN, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, GAYNELLE GOODRICH, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, RUTH THOMAS, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, FRANK BOGARD, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, RON McGRUDER, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, JAMES A. MONAGHAN, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, JAMES BEUTEL, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska, LEO KASTRICK, Individually, and as a Member of the Board of Education, School District #1, Douglas County, Nebraska,

Respondents.

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STATUTES AND RULES

The relevant portions of 42 U.S.C. §§ 1983 and 1988, the Education for All Handicapped Children Act of 1975, Rule 19(6) of the Supreme Court Rules, and former § 43-662 of Nebraska Revised Statutes (1978), are set forth in the Appendix, *infra* 1n-3n.

STATEMENT OF THE CASE

The School District respondents concur in the Petitioners' Statement of the Case.

ARGUMENT

I.

The Court Of Appeals Properly Held That A Fee Award Against The School District Respondents Would Be Unjust Where Such Respondents' Actions Did Not Provide The Basis For Plaintiff's Successful Claim.

As this Court has repeatedly ruled, when an award of attorneys' fees is to be determined, "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on which . . . ultimate relief was obtained." *Smith v. Robinson*, — U.S. —, 82 L.Ed.2d 746, 104 S.Ct. 3457, 3466 (1984) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stenson*, 465 U.S. —, 79 L.Ed.2d 892, 104

S.Ct. 1541 (1984)). "[F]ees are not properly awarded for work done on a claim on which plaintiff did not prevail and which involved distinctly different facts and legal theories from the claims on the basis of which relief was awarded." *Id.* The Court of Appeals' decision should be affirmed to the extent it correctly held that an award of attorneys' fees against the School District respondents would be unjust where no action on their part provided the basis for plaintiff's successful claim. *Rose v. State of Nebraska*, 748 F.2d 1258 (8th Cir. 1984) (App. 15J).[2]

A. Rose's claim against the School District respondents cannot be the subject of an attorney fee award as it was unsuccessful and unrelated to Rose's independent due process claim against other defendants.

After receiving proper notification from the School District respondents of a proposed change in his handicapped daughter's educational program, George Rose requested the due process hearing guaranteed to him by § 1415 of EAHCA to determine her appropriate educational placement (App. 7A). The hearing officer found that the new placement recommended by the School District was an appropriate educational program for Marla Rose. The District Court held that the hearing officer's decision was correct and that "Rose was clearly not a 'prevailing party' at the administrative level . . . ." *Rose v. State of Nebraska*, 575 F.Supp. 132 (D. Neb. 1983) (App. 10I). The District Court also ruled that the initial

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[2] App. refers to the Petitioners' Appendix to their Petition for a Writ of Certiorari in the present proceeding which contains all of the decisions below. The number which follows is the page designation in that Appendix.

placement and hearing process, that portion of the claim involving the School District respondents, did not deviate from the procedures mandated by EAHCA in any way. *Rose v. State of Nebraska*, 530 F. Supp. 295 (D. Neb. 1981) (App. 13F).

The Court of Appeals agreed that the only possible error in the entire proceeding occurred when the Education Commissioner "reviewed" the hearing officer's findings pursuant to a Nebraska statute allegedly at odds with the mandate of the EAHCA. *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982) (App. 5G). No connection was ever alleged or shown between any of the School District respondents and either the Commissioner's "review" of the hearing officer's decision in this case or former Neb. Rev. Stat. §43-662 (1978) [amended, current version at Neb. Rev. Stat. §§ 43-662, 43-662.01 (Reissue 1984)].[3] For this reason the Court of Appeals held that the only award of fees warranted was against the Education Commissioner and the members of the State Board of Education in their official capacities. *Rose v. State of Nebraska*, 748 F.2d 1258 (8th Cir. 1984) (App. 15J-16J). The Court of Appeals' opinion stated:

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[3] Had Rose attempted to allege a constitutional violation against the School District respondents, no § 1983 action could lie for lack of any "causal connection" between the respondents and the constitutional violation that is the subject of the complaint. *See, Monell v. New York City Department of Social Services*, 436 U.S. 658, 692 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976); *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982). For this reason, the Court of Appeals ruled that the other state officials, "with a much more direct connection to the very part of state process that raised the federal-law issue on which plaintiff prevailed" were the only defendants liable for the due process violation under § 1983 and for attorneys' fees under § 1988. *Rose v. State of Nebraska*, 748 F.2d 1258 (8th Cir. 1984) (App. 15J-16J).

> The School District was a necessary defendant, but in the special circumstances of this case, we believe that no fee award should be made against it. . . . The local school district did only what it reasonably believed was compelled by state law. It was the involvement of the Commissioner of Education in the later administrative stages of the case, not anything done by the local school district, that provided the basis for plaintiff's successful claim that the state administrative process conflicted with federal law.

Id. Thus it is clear that Rose achieved no success in any claim against the School District respondents.

When a party prevails against some defendants, but certain other defendants have been found not liable as a matter of law, no attorneys' fees should be awarded under § 1988 against the defendants found not liable. *E.g., Dean v. Gladney,* 621 F.2d 1331 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981) (attorneys' fees under § 1988 upheld as against two individual defendants and not awarded as against county or city who had not violated appellant's rights); *Bell v. Board of Education,* 491 F. Supp. 916 (N.D. Ohio 1980) (§ 1988 attorneys' fees awarded only against the two defendants found liable and not against the five absolved); *Scheriff v. Beck,* 452 F.Supp. 1254 (D. Colo. 1978) (plaintiff was not entitled to § 1988 award for fees incurred in pursuit of his claims against both defendants but only against the defendant found liable to plaintiff); *Arkansas Community Organizations v. Arkansas State Board,* 468 F.Supp. 1254 (E.D. Ark. 1979) (where no sanctions were imposed on a defendant he was not liable for attorneys' fees even though plaintiff presented a theory of liability as to him and he participated in the case).

This Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983) dealt only with a case of multiple claims against the same defendant. In that situation this Court held that unsuccessful, unrelated claims must be treated as if they had been raised in separate lawsuits, and no fee may be awarded for services on an unsuccessful claim. *Id.*[4] Courts applying this rule in cases with multiple defendants have held that defendants against whom the plaintiff was unsuccessful are *not liable* for attorneys' fees. The courts have then determined whether the unsuccessful claims were related to work done on the plaintiff's successful claims so as to be chargeable *against the defendants found liable. E.g., Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Riddell v. National Democratic Party,* 712 F.2d 165 (5th Cir. 1983); *Rosario v. Amalgamated Ladies' Garment Cutters' Union,* 749 F.2d 1000 (2d Cir. 1984); *Vaughns v. Board of Education,* 598 F.Supp. 1262 (D. Md. 1984); *Neal v. Berman,* 576 F.Supp. 1250 (E.D. Mich. 1983). Because Rose was in no way successful in his claim against the School District respondents, he can be awarded no attorneys' fees against them.[5]

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[4] The District Court applied the *Hensley* rule to limit the fee award requested by Rose by forty percent due to the limited success Rose achieved.

[5] According to the rule of *Hensley,* fees for work on Rose's claim against the School District respondents could not be assessed even against those defendants found liable on the independent due process claim since the claims were factually unrelated and based on separate legal theories. The factual basis of Rose's claim against the School District respondents—the School District's proposal to place Marla Rose as a day student at the Nebraska School for the Deaf—is wholly unre-

(Continued on following page)

B. Because the judgment being appealed by petitioners was not against the School District respondents, the School District respondents lack any interest therein and may be omitted from the case under Rule 19(6).

This Court long ago held that a writ of error on a judgment in personam against one defendant may be brought to this Court by the party against whom the judgment is rendered, without joining other defendants. *Germain v. Mason,* 79 U.S. (12 Wall) 259 (1871). The principle is codified in Sup.Ct.R. 19(6). Only parties to a joint judgment and not merely parties to the record are considered to have an interest in the subject matter of an appeal. *Winters v. United States,* 207 U.S. 564 (1908).

(Continued from previous page)

lated to the factual situation objected to in Rose's claim against the Education Commissioner and the State Board members—that the Education Commissioner reviewed the hearing officer's report. Rose's legal theory against the School District respondents—that the School District allegedly did not provide an appropriate education in violation of the guarantees of EAHCA—is in obvious contrast to his claim that the Education Commissioner and State Board members failed to provide an impartial due process hearing in violation of § 1983.

The Court of Appeals held the School District respondents were not liable for fees because the allegedly colorable actions of the Commissioner of Education in the later administrative stages of the case were completely separate from anything done by the School District respondents. *Rose v. State of Nebraska,* 748 F.2d 1258 (8th Cir. 1984) (App. 15J-16J). In fact, the Court of Appeals based its decision that an award of fees could be allowed at all, even against the Commissioner and Board, on a decision that Rose's due process claim was *independent* of his EAHCA claims under the rule of *Smith v. Robinson,* — U.S. —, 82 L.Ed.2d 746, 104 S.Ct. 3457 (1984). *Id.* at App. 13J.

In this case petitioners are the only parties damaged by an alleged error of the court. The Court of Appeals ruled specifically that only the Education Commissioner and State Board members in their official capacities were liable for fees under § 1988. The School District respondents were specifically found not liable.[6] There was no joint judgment or decree involving both petitioners and the School District respondents. Thus, there is no longer any need to join the School District respondents in this case. Petitioners have not designated the School District respondents as respondents in their listing of parties to the proceeding before this Court. *See* Petition at ii n.1.

II.

No Fee Award Can Be Made Against The School District Respondents Under The Teachings Of Smith v. Robinson Since Rose Made No Successful Independent Due Process Claim Against Them.

The Court of Appeals held that Rose prevailed on his claim that former Neb. Rev. Stat. § 43-662 (1978) [amended, current version at Neb. Rev. Stat. §§ 43-662, 43-662.01 (Reissue 1984)] contained language conflicting with § 1415(e) of EAHCA in that the Nebraska statute allegedly allowed the Education Commissioner to review the findings of the impartial hearing officer. *Monahan v. State of Nebraska,* 687 F.2d 1164 (8th Cir. 1982) (App. 13G-14G). By complying with this Nebraska statute and adopting the hearing officer's decision verbatim as to Marla Rose, the Education Commissioner and State Board members were held to have deprived Rose of the impartial

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[6] See *supra* note 3.

due process hearing guaranteed by the EAHCA. *Id.* This act, by the State Defendants alone, also constituted the alleged *independent* due process violation for which fees were awarded against the Education Commissioner and State Board members. This act was entirely *separate* from Rose's EAHCA claim against the School District respondents. *Id. See Smith v. Robinson,* — U.S. —, 82 L.Ed.2d 746, 104 S.Ct. 3457 (1984).[7]

This Court held in *Smith* that the comprehensive nature of EAHCA demonstrates Congress' intent to preclude attorney fee awards under §1988 unless the plaintiff has alleged an independent § 1983 action that is sufficiently related to his successful EAHCA claim. *Id.* This rule exonerates the School District respondents on two

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[7] This Court declared in *Smith v. Robinson:*

> [W]hile Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have *had to resort to judicial relief to force* the agencies to provide them the process they were constitutionally due.

— U.S. —, 104 S.Ct. 3457, 3471 n.17 (1984) (emphasis added). The Court of Appeals held that a fee award was warranted against the Commissioner and School Board members since Rose had to resort to judicial relief to obtain an EAHCA administrative hearing that was "impartially conducted." *Rose v. State of Nebraska,* 748 F.2d 1258 (8th Cir. 1984) (App. 13J). The School District respondents, however, had fully complied with the mandates of the EAHCA applicable to their participation in the case and were found to have provided Marla Rose the appropriate educational placement she needed. Rose had already been afforded due process and all EAHCA guarantees by the School District respondents without any resort to the judicial process. *Monahan v. State of Nebraska,* 645 F.2d 592 (8th Cir. 1981) (App. 13C).

bases: first, Rose had *no successful EAHCA claim* as to the School District. Rose sued the School District respondents attempting to force a change in Marla Rose's educational placement, but the hearing officer and courts below found the School District's proposal *to be appropriate.* The Courts below also found that the School District respondents *correctly implemented* the procedural mandates of EAHCA.

Second, if there was any relationship between any of Rose's claims, it was between his successful EAHCA claim against the Education Commissioner and State Board members and his claim alleging a violation of the Due Process Clause, both factually based on the Commissioner's role in the hearing process. There was no § 1983 violation by the School District respondents, and no act by them related to Rose's successful EAHCA claim against the State defendants. Thus, the Court of Appeals *properly held* that no fee award could lie against the School District respondents. *Rose v. State of Nebraska,* 748 F.2d 1258 (8th Cir. 1984) (App. 15J).

Even if Rose's due process claim against the Education Commissioner's "review," *arguendo,* could have reached down and encompassed in its sweep the unrelated actions of the School District respondents, no actual violation of due process was ever shown. The courts below only answered the question necessary to determine whether a preliminary injunction could be granted—whether plaintiff had shown probability of success on the merits. They never *decided* that the state and federal schemes were inconsistent or that the Commissioner's review was anything more than a "rubber stamp" on the hearing officer's report which would not have damaged

any rights of Rose. *Monahan v. State of Nebraska,* 645 F.2d 592 (8th Cir. 1981) (App. 13C) .

In fact, the Court of Appeals held that the complaint "[r]eferences to 42 U.S.C. § 1983 are even more cryptic a d seem to have been included as another means of mak- the same procedural arguments. We are not persuaded, on the record before us, that it was error to dismiss these complaints without prejudice." *Monahan v. State of Nebraska,* 687 F.2d 1164 (8th Cir. 1982) (App. 9G). The Court of Appeals later ruled that Rose prevailed, to the extent that he did at all, on his EAHCA ground, and that the constitutional or § 1983 ground was "*not actually reached.*" *Id.* at App. 14G (emphasis added).

Nothing suggests that having a commissioner or executive officer of any governmental department enter an order enforcing a hearing officer's determination is *per se* a violation of the Due Process Clause of the Fourteenth Amendment.[8] Thus, Rose would not have prevailed on his independent constitutional claim had it been addressed. The preliminary injunction against the Commissioner was

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[8] The EAHCA is essentially a federal funding statute for States which agree to follow the procedural guidelines set forth therein. To hold that there is an assumed violation of § 1983 when the state procedural implementations of the EAHCA do not exactly coincide with the federal statutes is nothing less than enlarging the statutory remedy of the EAHCA via the "and laws" provision of § 1983. The rule of this Court in *Middlesex County Sewage Authority v. National Sea Clammers Association,* 453 U.S. 122 (1981) requires a finding that the Court of Appeals incorrectly assumed a deprivation of Due Process under the Fourteenth Amendment from what was, at most, a mere violation of the EAHCA for which no award of attorneys' fees can lie.

founded on a violation of EAHCA and not of the Fourteenth Amendment. And, of course, no fee award lies for an EAHCA claim standing by itself. *Smith v. Robinson*, — U.S. —, 82 L.Ed.2d 746, 104 S.Ct. 3457 (1984).

It would be patently unjust to assume, when cogent evidence to the contrary was never examined, that Rose would have prevailed on the only ground that could have warranted a fee award. As this Court held in *Smith v. Robinson*, "it is clear that plaintiff may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required." — U.S. —, 104 S.Ct. 3457, 3467 (1984). No such examination was ever made in the case of Rose's due process claim. To grant fees to Rose simply in response to his incantation of § 1983 would be to make fees available in almost every EAHCA case. *Id.* at 3465.

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CONCLUSION

The School District respondents need not be parties to this appeal. Rose did not succeed in any claim against the School District respondents, and no judgment was entered against them individually or jointly with the State defendants. The litigation instead resulted in a finding that the educational placement proposal and procedures followed by the School District respondents were completely correct, and that no fees could justly be awarded against them.

The preliminary injunction which was granted to Rose was based solely on his EAHCA claim. This Court has construed the intent of Congress to eliminate fee awards from EAHCA actions. To grant fees to Rose simply in response to his incantation of §1983 would defeat Congress' intent and make fee awards available against even wholly exonerated school districts in almost every EAHCA action, particularly if the State defendants are immune from such awards under the Eleventh Amendment.

For any and all the reasons discussed here, this Court should hold that the School District respondents need not be joined in this appeal and that no award of attorneys' fees should be entered against them.

Respectfully submitted,

JOHN PAUL HEIL
of BAIRD, HOLM, MCEACHEN,
PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68102
(402) 344-0500

Attorneys for the School District Respondents

APPENDIX

STATUTES INVOLVED:

Neb. Rev. Stat. § 43-662 (1978) [amended, current version at Neb. Rev. Stat. §§ 43-662, 43-662.01 (Reissue 1984)]:

> *State Department of Education; conduct hearings; report; Commissioner of Education; duties.* The State Department of Education shall conduct hearings, initiated under section 43-661, using hearing officers who shall prepare a report containing findings of facts based on the evidence presented and decisions based on such findings. After reviewing such findings and decisions the Commissioner of Education shall then recommend or direct such action as may be necessary.

Sup. Ct. R. 19(6):

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

20 U.S.C. § 1415(e):

> (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall

be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

42 U.S.C. § 1988:

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law,

the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.